

# Decisions of Interest

NOVEMBER 20, 2023

## CRIMINAL

### FIRST DEPARTMENT

***People v Cruz*** | November 14, 2023

PLEA BARGAIN | PROMISE NOT FULFILLED | CONVICTION REDUCED

The appellant appealed from a Bronx County Supreme Court judgment convicting him of attempted 3<sup>rd</sup> degree CSCS based on his guilty plea and sentencing him to 3½ years. The First Department modified in the interest of justice by reducing the conviction to 7<sup>th</sup> degree CPCS and the sentence to time served. As part of the plea bargain, the appellant was promised a chance to complete a drug treatment program as an alternative to prison—but was not given that chance, nor an opportunity to withdraw his plea before sentencing. Because the appellant had already completed his sentence, he was entitled to the benefit of the original promise of a class A misdemeanor conviction and a sentence of time served. The Legal Aid Society of NYC (Sarah Chaudhry, of counsel) represented the appellant.

[People v Cruz \(2023 NY Slip Op 05695\)](#)

### SECOND DEPARTMENT

***People v Tirado*** | November 15, 2023

ENHANCED SENTENCE | EXCESSIVE | MODIFIED

The appellant appealed from a Kings County Supreme Court judgment convicting him of 2<sup>nd</sup> degree murder, attempted 2<sup>nd</sup> degree murder, and 2<sup>nd</sup> degree CPW and imposing an enhanced aggregate sentence of 50 years to life. The Second Department modified by running the two 25-year terms concurrently and otherwise affirmed. The defendant pleaded guilty in exchange for an agreed-upon aggregate sentence of 25 years to life. Although Supreme Court had a sufficient basis for imposing an enhanced sentence based on two plea condition violations, the enhancement was excessive. Appellate Advocates (Lynn W. L. Fahey and David P Greenberg, of counsel) represented the appellant.

[People v Tirado \(2023 NY Slip Op 05745\)](#)

## THIRD DEPARTMENT

### ***People v Fisher*** | November 16, 2023

DVSJA RESENTENCING | NO TEMPORAL NEXUS | DENIAL AFFIRMED

The appellant appealed from a Saratoga County Court order that denied her CPL 440.47 resentencing motion after a hearing. The Third Department affirmed. The evidence showed that the appellant had been subjected to substantial physical abuse by her father. But it failed to show that the abuse occurred at the time she assaulted her parents, or that the abuse was a significant contributing factor to the offense. While the abuse does not need to occur contemporaneously with the offense, the statute's language creates a requirement of a temporal nexus between the abuse and the offense.

[People v Fisher \(2023 NY Slip Op 05764\)](#)

## FOURTH DEPARTMENT

### ***People v Walker*** | November 17, 2023

SUPPRESSION | REVERSED | INDICTMENT DISMISSED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 2<sup>nd</sup> degree CPCS. The Fourth Department reversed, granted suppression, and dismissed the indictment. An officer testified that he stopped the appellant's vehicle after a DMV check of his license plate number came back suspended for an insurance lapse. Generally, this sort of transmitted information is presumptively reliable and furnishes probable cause—but the appellant submitted a verification of insurance form showing that there was no lapse in coverage. The presumption of reliability disappears when an arresting officer's warrantless action is challenged, and the People must affirmatively prove the officer's probable cause to act. Here, the People failed to prove the reliability of the DMV transmission. The Monroe County Public Defender (Guy Talia, of counsel) represented the appellant.

[People v Walker \(2023 NY Slip Op 05902\)](#)

### ***People v Barner*** | November 17, 2023

NO PROBABLE CAUSE | INVOLUNTARY CONSENT | SUPPRESSED AND DISMISSED

The appellant appealed from a Jefferson County Court judgment convicting him of attempted 3<sup>rd</sup> degree CPCS based on his guilty plea. The Fourth Department reversed, suppressed drugs and the appellant's statements, and dismissed the indictment. The appellant's car was stopped by police primarily based on information that he was delivering drugs to customers, but the source of this information was not disclosed at the suppression hearing. Although the appellant consented to a search of his car, his consent was involuntary because the officer said that, if he did not consent, he would detain the car until he obtained a warrant and search the car anyway. The officer did not have probable cause sufficient to obtain a warrant, making his threat to do so hollow and misleading. Piotr Banasiak represented the appellant.

[People v Barner \(2023 NY Slip Op 05839\)](#)

### ***People v Lavelle*** | November 17, 2023

INSUFFICIENT EVIDENCE | RECKLESSNESS | DISMISSED

The appellant appealed from a Monroe County Court judgment convicting him of 2<sup>nd</sup> degree manslaughter after a jury trial. The Fourth Department reversed and dismissed the indictment. The proof that the appellant recklessly caused the death of another person was legally insufficient. The only risk-creating behavior the appellant engaged in was briefly driving on the shoulder of the road to pass a car turning in front of him, then making a sharp left turn and crossing the double yellow line into the opposite lane of traffic. Easton Thompson Kasperek Shiffrin LLP (Donald M. Thompson, of counsel) represented the appellant.

[People v Lavelle \(2023 NY Slip Op 05920\)](#)

### ***People v Vandermallie*** | November 17, 2023

SORA | UNCERTAIN LIVING SITUATION | MODIFIED

The appellant appealed from a Monroe County Court order designating him a level three sex offender. The Fourth Department modified by designating him a level two sex offender. County Court improperly assessed 10 points under risk factor 15 because the People did not establish that the appellant's living situation was inappropriate. At most it was uncertain which, standing alone, is insufficient. The Monroe County Public Defender (David R. Juergens, of counsel) represented the appellant.

[People v Vandermallie \(2023 NY Slip Op 05845\)](#)

### ***People v Scott*** | November 17, 2023

VIOLENT FELONY OFFENDER | HEARING REQUIRED

The appellant appealed from a Cayuga County Court judgment convicting him of 2<sup>nd</sup> degree assault based on his guilty plea. The Fourth Department vacated the sentence and remitted. County Court erred in sentencing the appellant as a persistent violent felony offender without a hearing. Defendant admitted his prior violent felony convictions, but he did not concede that he was sentenced on at least two of those convictions within 10 years of the instant offense. Further, the record contained insufficient information about his prior terms of incarceration to make any findings regarding tolling. Veronica Reed represented the appellant.

[People v Scott \(2023 NY Slip Op 05900\)](#)

### ***People v Lewinski*** | November 17, 2023

PEOPLE'S APPEAL | INSUFFICIENT GJ EVIDENCE | DISMISSAL AFFIRMED

The People appealed from an Erie County Court order that dismissed an indictment charging the respondent with criminally negligent homicide. The Fourth Department affirmed. The proof that the respondent shoved the victim once during an argument, which caused the victim to fall and hit his head, did not establish a prima facie case that the respondent acted with criminal negligence. Lipsitz Green Scime Cambria LLP (Herbert L. Greenman, of counsel) represented the respondent.

[People v Lewinski \(2023 NY Slip Op 05827\)](#)

## ***People v Watkins*** | November 17, 2023

SUPPRESSION | AFFIRMED | DISSENT

The appellant appealed from a Monroe County Court judgment convicting him of 2<sup>nd</sup> degree CPW based on his guilty plea. The Fourth Department affirmed, with two justices dissenting. Police received a report of shots fired. The caller stated there were three Black “kids,” one of whom had a gun and was wearing a blue jacket. Officers approached a group of four Black males in the general vicinity, and the appellant fled. An officer testified that, while running, the appellant’s hand was in front of his body as if holding something in his pocket or waistband. The officers found a loaded semiautomatic handgun in his sweatshirt. The dissent did not credit the officer’s testimony that the appellant had his hand in his waistband or that he was running in an “unorthodox” manner. In any event, having your hands in your pockets on a cold evening in Western NY is subject to an innocent interpretation. Moreover, the appellant did not match the caller’s description, and the officer who conducted the pat-search did not testify and did not preserve his body camera footage. The appellant’s flight, without further indication of criminality, was insufficient to justify the pursuit.

[People v Watkins \(2023 NY Slip Op 05804\)](#)

## TRIAL COURTS

### ***People v Mayo*** | 2023 WL 7599064

CPL 440.10 | EYEWITNESS’ IMPAIRED VISION | REVERSED AND DISMISSED

Mayo and Perkins moved under CPL 440.10 to vacate their 2001 2<sup>nd</sup> degree murder convictions. Kings County Supreme Court granted the motions based on newly discovered evidence that the sole eyewitness to the shooting had lied about his eyesight. The witness testified that he only needed his glasses for reading. At the 440 hearing, his ex-wife testified that he had poor eyesight and needed his glasses for much of daily living, but he often did not wear them for vanity reasons. An ophthalmologist also opined that, given the witness’ diagnosis and eyeglass prescriptions, he would have had difficulty seeing at multiple distances. Because the People’s case hinged on the witness’ credibility, the new evidence would have probably resulted in a more favorable verdict. [NOTE: On June 16, 2023, Supreme Court granted the People’s motion to dismiss the charges against Mayo and Perkins.]

[People v Mayo \(2023 NY Slip Op 51194\[U\]\)](#)

[The National Registry of Exonerations](#)

### ***People v Johnson*** | 2023 WL 7480570

CPL 30.30 | INVALID COC | DISMISSED

Johnson moved to dismiss DWAI drug and related motor vehicle charges on speedy trial grounds based on the People’s failure to comply with its discovery obligations. Webster Town Court granted the motion. The People failed to timely provide the drug recognition evaluation and the rolling logs of the drug recognition expert, both of which are statutorily deemed to be in their possession. The People provided no reason for their belated disclosure or describe any diligent efforts they made to obtain the documents earlier. Prejudice is not relevant to CPL 30.30 dismissal. The Monroe County Public Defender (Elizabeth D. Buckley and Kirby W. Leggett, of counsel) represented Johnson.

[People v Johnson \(2023 NY Slip Op 51185\[U\]\)](#)

### ***People v Silva-Torres* | 2023 WL 7502493**

CPL 30.30 | INVALID COC | DISMISSED

Silva-Torres moved to dismiss the misdemeanor charges on speedy trial grounds based on the People's failure to comply with its discovery obligations. New York County Criminal Court granted the motion. The People failed to disclose all records underlying allegations of police misconduct. IAB records are deemed to be in the People's possession. Without disclosing complete records underlying unsubstantiated disciplinary findings that may be used to impeach a witness, the People cannot file a valid COC. Regardless of good faith, the People failed to demonstrate their due diligence in seeking to obtain the underlying records. NYC Legal Aid Society (Khushboo Sapru, of counsel) represented Silva-Torres. [People v Silva-Torres \(2023 NY Slip Op 23351\)](#)

### ***People v Flores-Garcia* | 2023 WL 7846805**

CPL 30.30 | DISCOVERY | DISMISSED

Flores-Garcia moved to dismiss DWI and other related charges on speedy trial grounds. Bronx County Criminal Court granted the motion. After the People disclosed redacted *Giglio* materials without prior authorization, the court set a deadline for them to disclose certain unredacted entries. The People did not timely comply, nor did they respond to Flores-Garcia's motion to dismiss. Their period of noncompliance was chargeable to the prosecution. The Bronx Defenders (Edward Soto, of counsel) represented Flores-Garcia. [People v Flores-Garcia \(2023 NY Slip Op 51199\[U\]\)](#)

## **FAMILY**

## **SECOND DEPARTMENT**

### ***Matter of Janvier v Santana-Jackson* | November 15, 2023**

PREMATURE DETERMINATION | INCOMPLETE HEARING | REVERSED

The mother appealed from a Westchester County IDV Court order that granted the father's modification/relocation petition and denied her cross-petition. The Second Department reversed and remitted for completion of a hearing. Early on in this lengthy proceeding, Family Court issued an interim order continuing the father's sole custody and allowing him to enroll the child in preschool in New Jersey. Over three years after commencement, Family Court granted the father's petition and denied the mother's cross-petition, even though it had not yet received a previously ordered updated forensic evaluation or heard closing arguments. Family Court could not make a final custody determination without completing the hearing to determine the best interests of the child. Christina T. Hall represented the appellant.

[Matter of Janvier v Santana-Jackson \(2023 NY Slip Op 05732\)](#)

### ***Matter of Hunte v Jones* | November 15, 2023**

ATTORNEYS' FEES | FRIVOLOUS CONDUCT | REVERSED

The mother appealed from a Westchester County Family Court order directing her to pay the father \$1,250 as reasonable attorneys' fees for her frivolous conduct. The Second Department reversed and remitted to a different judge. The mother was not given a

reasonable opportunity to be heard. Family Court never set a briefing schedule for the sanctions motion and denied the mother's new attorney's request to file opposition papers. Further, Family Court decided the sanctions motion after indicating that it intended to grant the mother's recusal motion. Irene J. Goldsmith represented the mother. [Matter of Hunte v Jones \(2023 NY Slip Op 05731\)](#)

## THIRD DEPARTMENT

### ***Matter of Shayne FF. v Julie GG.*** | November 16, 2023

CHANGE IN CIRCUMSTANCE | NARROW INTERPRETATION | DISMISSAL REVERSED

The father appealed from a Tioga County Family Court order that dismissed his custody modification petitions. The Third Department reversed and remitted. Family Court erred when it found that the father did not show a change in circumstances. A prior custody order prohibited the mother from moving more than 50 miles from her then-current residence. Nine years later, the mother moved to another county. While the move was less than 50 miles from her previous home, it increased the father's drive to transport the child from 10-15 minutes to over an hour each way. The prior order did not address who was responsible for transporting the child, which had become a point of contention. Family Court erred in narrowly interpreting the father's petitions and considering only the distance of the move—there was evidence of other changes in circumstance, and the court erred by curtailing significant testimony relevant to the father's claimed changes in circumstance and the child's best interest. John A. Cirando represented the father.

[Matter of Shayne FF. v Julie GG. \(2023 NY Slip Op 05767\)](#)

### ***Matter of Mirely M. v Wilbert L.*** | November 16, 2023

TPR | CUSTODY PETITION DISMISSED | MOOT

The stepmother and the father appealed from a Schenectady County Family Court order that dismissed the stepmother's custody petition and denied the father's motion to modify a placement order. The Third Department affirmed. The child was removed from the mother's care shortly after birth and was placed in foster care. The father was incarcerated at the time and married the stepmother the month after the child was born. The stepmother subsequently filed an article 6 petition seeking custody of the child. The mother's parental rights were later terminated, and the father filed a motion seeking to have the child placed with the stepmother. After appealing the denial of his motion, the father surrendered his parental rights which, in the absence of a challenge to the surrender, rendered his appeal moot. Adoption is the sole means to gain custody of a child after termination of both biological parents' rights; thus, the stepmother's appeal from the dismissal of her custody petition was moot.

[Matter of Mirely M. v Wilbert L. \(2023 NY Slip Op 05772\)](#)

# FOURTH DEPARTMENT

***Matter of Zakiyyah T. (Lamar R.)*** | January 17, 2023

***Matter of Shaymari R. (Lamar R.)***

NEGLECT | REVERSED

The father and stepmother appealed from Erie County Family Court orders determining that the father had sexually abused the two subject children and the stepmother had neglected the younger child by failing to protect her after she disclosed the abuse. The Fourth Department reversed the neglect finding against the stepmother and otherwise affirmed. Once the younger child disclosed the abuse, the stepmother separated the child from the father and no further abuse took place. Further, CPS expunged the indicated report of maltreatment against the stepmother, and DSS had since moved to vacate the order of fact finding and disposition against the stepmother. Charles J. Greenberg represented the stepmother appellant.

[\*Matter of Zakiyyah T. \(Lamar R.\) \(2023 NY Slip Op 05812\)\*](#)

[\*Matter of Shaymari R. \(Lamar R.\) \(2023 NY Slip Op 05813\)\*](#)

The ILS Decisions of Interest summaries are for informational purposes only and are not intended to provide legal advice to any individual or entity. While every effort has been made to ensure their accuracy, the summaries are provided on an “as is” basis with no express or implied guarantees of completeness, accuracy, or timeliness.



**Statewide Appellate Support Center**

**New York State Office of Indigent Legal Services**

80 S Swan St, Ste 1147, Albany, NY 12210 | [www.ils.ny.gov](http://www.ils.ny.gov)

(518) 486-6602 | [SASC@ils.ny.gov](mailto:SASC@ils.ny.gov)